UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOVEY ELECTRIC, INC.

and

Cases 7-CA-40164
7-CB-11532

UNITED CONSTRUCTION WORKERS,
LOCAL # 18, CHRISTIAN LABOR ASSOCIATION
of the UNITED STATES OF AMERICA

and

LOCAL 131, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Donna M. Nixon Esq., of Detroit, MI, for
the General Counsel.
Ted Iorio Esq., of Grand Rapids, MI, for
the Charging Party.
David J. Masud, Esq., of Saginaw, MI, for
the Respondent-Employer.
Curtis R. Witte, Esq., of Grand Rapids, MI, for
the Respondent-Christian Labor Organization.

SUPPLEMENTAL DECISION AND ORDER

Bruce D. Rosenstein, Administrative Law Judge. On October 28, 1997, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a Consolidated Complaint and Notice of Hearing (the complaint), based on charges filed by Local 131, International Brotherhood of Electrical Workers, AFL-CIO (the Charging Party or IBEW), which alleged that Hovey Electric, Inc. (Respondent Hovey or Hovey) has engaged in certain violations of Section 8(a)(1), (2) and (3) of the National Labor Relations Act (the Act), and that the United Construction Workers, Local #18, Christian Labor Association of the United States of America (Respondent CLA or CLA), has engaged in certain violations of Section 8(b)(1)(A) and 8(b)(2) of the Act. Respondent Hovey and Respondent CLA denied the commission of any unfair labor practice, and a hearing was held before me in Kalamazoo, Michigan, on January 28, 1998. The General Counsel, Respondent Hovey and Respondent CLA, thereafter, filed post-hearing briefs. On June 15, 1998, I issued a decision finding that Respondents Hovey and CLA entered into a valid Section 8(f) collective bargaining agreement on August 13, 1997, that was later converted into a valid Section 9(a) collective bargaining agreement on October 16, 1997. Accordingly, I held that Respondent Hovey did not engage in violations of Section

8(a)(1), (2), and (3) of the Act [1] and that Respondent CLA did not engage in violations of Section 8(b)(1)(A) and (2) of the Act. Therefore, I dismissed the complaint in its entirety. The General Counsel filed exceptions and a supporting brief, and Respondent Hovey and Respondent CLA filed answering briefs. On April 30, 1999, the Board affirmed my decision in *Hovey Electric Inc.,* 328 NLRB No. 35. Thereafter, on May 28, 1999, Respondent Hovey and Respondent CLA filed with the Board separate Applications for Attorney's Fees and Expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. &504 (1982) (herein EAJA), and Section 102.143 of the Board's Rules and Regulations. Respondent CLA filed an amendment to said application on June 1, 1999. The Board issued an Order referring the matter to me on June 1, 1999. The IBEW filed comments on Respondent Hovey and Respondent CLA Applications for Attorney's Fees and Expenses on June 25, 1999. The General Counsel filed a Motion to Dismiss Respondent Hovey and Respondent CLA Applications for Attorney's Fees and Expenses on June 29, 1999. By letter dated July 14, 1999, Respondent Hovey filed an opposition to the comments filed by the IBEW. On July 15, 1999, Respondent CLA filed an opposition to the General Counsel's Motion to Dismiss and on July 19, 1999, Respondent Hovey also filed an opposition to the General Counsel's Motion to Dismiss.

A. Propriety of an Award

EAJA , as applied through Section 102.143 of the Board's Rules and Regulations, provides that a "respondent in an adversary adjudication who prevails in the proceeding, or in a significant and discrete substantive portion of that proceeding" and who meets certain eligibility requirements relating to net worth, corporate organization, number of employees, etc., is eligible to seek reimbursement for certain expenses incurred in connection with that proceeding. Section 102.144 states that a reimbursement of such expenses will be awarded "unless the position of the General Counsel over which the party has prevailed was substantially justified." To meet this burden, the General Counsel must establish that he was substantially justified at each stage of the proceeding, i.e., at the time of the issuance of the complaint, taking the matter through hearing, and in filing exceptions to the judge's decision. An examination of the circumstances and evidence available to the General Counsel at these junctures is required in order to determine whether the General Counsel has carried his burden.

In order to determine whether the General Counsel has satisfied this test, it is necessary first to identify what constitutes substantial justification. The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits,[2] and that it is not intended to deter the agency from bringing forward close questions or new theories of the law.[3] The Supreme Court has defined the phrase "substantial justification" under EAJA as "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis both in law and fact." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). Thus in weighing the unique circumstances of each case, a standard of reasonableness will apply.

B. The Collective-Bargaining Agreement

[1] At the commencement of the hearing, the General Counsel amended the complaint to remove from the affirmative action section the requirement for reinstatement of Gregory Crawford. Accordingly, I approved a non-Board settlement resolving the issues surrounding the termination of Crawford. Additionally, I approved an informal Board settlement with the posting of a Notice regarding the independent violations of Section 8(a)(1) of the Act alleged in paragraph 9 of the complaint.

[2] *Jim's Big M,* 266 NLRB 665 (1983).

[3] *Laborers Funds of Northern California,* 302 NLRB 1031 (1991); *Craig & Hamilton Meat Co.,* 276 NLRB 974 (1985).

The Board has held that an employer cannot recognize a union as the exclusive collective bargaining representative of its employees by executing a Section 9(a) agreement without a showing that the union enjoys majority support. *John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub. nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d. Cir. 1988).

In executing the subject collective bargaining agreement on August 13, 1997, the parties' agreed to a recognition clause in Article I of the Agreement that provides:

> Subsequent to proof having been submitted to the Employer by the Union that the majority of his employees are members of the Union, the Employer recognizes the Union as the sole bargaining representative of his employees, exclusive of office help, superintendents and foremen having authority to hire and discharge or to effectively recommend such action, in all matters pertaining to their employment and working conditions.

The language in the recognition clause is not unlike the language found by the Board in *Goodless Electric Co.,* 321 NLRB 64 (1996), enfd. denied, 124 F.3d 322 (1st Cir. 1997), *Decorative Floors, Inc.,* 315 NLRB 188 (1984), and *Golden West Electric,* 307 NLRB 1494 (1992), that establishes a Section 9(a) bargaining relationship. The General Counsel, before the issuance of the complaint, was in possession of a sworn affidavit signed on October 9, 1997, by CLA representative Michael Koppenol. In paragraph 8 of the affidavit, Koppenol states that "On or about August 10, 1997, I received in the mail a full contract draft from Masud, which I read over and signed on August 11, 1997. I noticed that Masud had included 9(a) recognition language, although we had talked about an 8(f) contract. As of August 11, 1997, I had not yet met any of the bargaining unit employees of Hovey, and I had no evidence of majority support for CLA from those employees."

I previously found, after hearing the testimony of Hovey and CLA witnesses, that the parties' August 13, 1997, collective bargaining agreement was entered into and maintained under Section 8(f) of the Act and remained an 8(f) agreement until October 16, 1997, when it was converted to a Section 9(a) agreement. I now conclude, however, based on the above evidence in the possession of the General Counsel before the complaint issued that it was not unreasonable for him to have determined that the recognition clause in the parties' agreement contained Section 9(a) language. Accordingly, I find that when the General Counsel issued the complaint its position was "substantially justified" concerning the Section 9(a) language in the parties' agreement. Thus, it was reasonable for the General Counsel to have alleged in paragraphs 13 and 14 of the complaint that Respondent Hovey granted recognition premised upon Section 9(a) of the Act to Respondent CLA at a time that Respondent CLA did not represent a majority of employees in the unit and was not the lawfully recognized exclusive collective bargaining representative of Hovey's employees

C. The Union Security Clause

The parties' agreement at Article II, Section 2 provides that:

> Each employee covered by this Agreement who is not a full member of the Union on the effective date of this Agreement, has the right to a "grace period" of twenty-nine (29) days in which to choose his/her status.

It is undisputed that the parties' agreement was implemented with retroactive effect so the effective date was April 1, 1997.

The Board has held that an agreement that permits employees less than 30 days to join is invalid and unenforceable. *Ned West, Inc.,* 276 NLRB 32 (1985).

I previously found that the parties' agreement was made retroactive to April 1, 1997, solely to permit Hovey to make a lump sum contribution to the pension plan for each employee based on the hours worked from April 1 to June 30, 1997. I now find, however, that it was not unreasonable for the General Counsel to have concluded at the issuance of the complaint that the union security clause shortened the agreed upon grace period required under the agreement. In this regard, since the General Counsel was relying on the August 13, 1997, execution date to commence the time for employees to fulfill their obligations to the CLA, it had a reasonable basis to conclude that the union security clause did not provide the full grace period to employees. Indeed, the General Counsel's investigation established that union dues and initiation fees were withheld on August 30, 1997, only seventeen days after the August 13, 1997, execution date of the parties' agreement, a period well in advance of the 30 days that was provided to employees in the parties' agreement.[4]

Under these circumstances, I find that the General Counsel was "substantially justified" in issuing the complaint and including paragraphs 11 through 14 therein. In this regard, Respondent CLA received aid, assistance and support from Respondent Hovey, notwithstanding that it did not represent an uncoerced majority of Hovey's employees.

D. The Section 8(a)(1), (2) and (3) Allegations of the Complaint

The General Counsel asserts in its Motion to Dismiss that at the issuance of the complaint it had a reasonable basis for concluding that supervisor Jeff Willi told employees that Hovey would pay extra wages to employees to cover CLA union dues and initiation fees. Moreover, during the investigation of the subject charges, two employees, Noll Coffinger and Robert Klein, gave affidavits as to their account of these statements and testified at trial to making the statements. The General Counsel concludes that these statements establish that Hovey was providing unlawful assistance to the CLA.

The General Counsel further argues that at the issuance of the complaint it had a reasonable basis for concluding that employees who had engaged in union activity were discriminatorily coerced and interrogated by the Employer, and that one employee was

[4] As found above, the General Counsel was "substantially justified" in concluding that the parties' collective bargaining agreement was premised on Section 9(a) of the Act.

terminated to discourage employees from engaging in concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

While the General Counsel acknowledges that the majority of the testimony to support these allegations was excluded from the hearing, because of independent settlement agreements, *Hovey Electric, Inc., supra,* slip op. at 2, fn. 2, it now wants to bootstrap that testimony to support its arguments that it was "substantially justified" in pursuing those allegations in the complaint.[5]

First, I find that the General Counsel did not have a reasonable basis to pursue the unlawful assistance allegation because the complaint did not allege that the statements attributed to Willi violated the Act.[6] Second, as it relates to the Section 8(a)(1) and (3) allegations, the Board affirmed my determination to exclude any testimony regarding the complaint allegations referenced in fn. 2 of my decision.[7]

Under these circumstances, I find that the General Counsel is precluded from attempting to use any evidence or testimony from the settlement agreements to now support its arguments that at the issuance of the complaint it had a reasonable basis to proceed on the Section 8(a)(1) and (3) allegations. Likewise, I find that since the General Counsel did not allege the statements attributed to Willi violated the Act, it cannot now use such evidence to support the unlawful assistance argument made in its post-hearing brief. In regard to the Section 8(a)(1) and (3) allegations, the settlement agreements removed those allegations from the complaint and the General Counsel cannot use those allegations to now attempt to argue that the original complaint allegations were justified.

Conclusions of Law

1. On October 28, 1997, the date on which the complaint in the underlying unfair labor practice proceeding was issued, Hovey Electric Inc., was a corporation with fewer than 500 employees and a net worth of less than Seven Million dollars.

2. Hovey and CLA prevailed in a significant and discrete substantive portion of the underlying unfair labor practice proceeding, which was an adversary adjudication.

3. The General Counsel's position in issuing the subject complaint was "substantially justified".

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[5] The General Counsel concedes that offers of proof were made at the trial, which I rejected, as not being relevant to the nature of the parties' collective bargaining relationship. It should be further noted that the General Counsel did not file an appeal to my approval of either settlement agreement under Section 102.26 of the Board's Rules and Regulations. Likewise, it is noteworthy that the alleged Section 8(a)(1) and (3) conduct alleged in paragraphs 9 and 15 of the complaint, all took place at a time after the execution of the Section 8(f) agreement on August 13, 1997.

[6] See fn. 2 of the Board's *Hovey Electric, Inc.,* decision.

[7] See fn. 1 of the Board's *Hovey Electric, Inc.,* decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The General Counsel's Motion to Dismiss Hovey's and CLA's Applications for an Award of Attorney's Fees and Expenses under the Equal Access to Justice Act is granted. Therefore, the Applications are dismissed.

Dated, Washington, D.C. August 27, 1999

Bruce D. Rosenstein
Administrative Law Judge

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.